

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE  
February 12, 2008 Session

**EMILE V. HAMM, MD and ANGELA HAMM, v. SCOTT D. HODGES, DO,  
CHATTANOOGA ORTHOPAEDIC GROUP, PC, ROGER W. CATLIN,  
MD, SUZANNE E. BENSON, MD, GREGORY WHITE, MD, THE  
CHATTANOOGA CENTER FOR PAIN MANAGEMENT**

**Direct Appeal from the Circuit Court for Hamilton County  
No. 04-C-464 Hon. L. Marie Williams, Circuit Judge**

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**No. E2007-01626-COA-R3-CV - FILED MAY 8, 2008**

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Plaintiff, a physician, brought a malpractice action against several defendant doctors and medical groups for damages which he averred resulted from negligent medical treatment. Defendants moved for summary judgment and filed their personal affidavits that their medical treatment met the standard of care in the communities where they practiced. Plaintiff answered and filed his personal affidavit disputing that defendants met the community standard of care. The Trial Court held that plaintiff's affidavit was deficient in that it did not comply with the statutory requirements to make his testimony admissible and granted summary judgment. On appeal, we affirm the Trial Court.

**Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed.**

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the Court, in which D. MICHAEL SWINEY, J., and SHARON G. LEE, J., joined.

Jeffrey D. Boehm, Chattanooga, Tennessee, for appellants Emile V. Hamm, M.D., and Angela Hamm.

Timothy J. Millirons, Chattanooga, Tennessee, for appellees Scott D. Hodges, D.O., Chattanooga Orthopaedic Group, P.C., Roger W. Catlin, M.D., Suzanne E. Benson, M.D., Gregory White, M.D., and the Chattanooga Center for Pain Management.

## OPINION

Plaintiffs, Emile Hamm, M.D. and wife brought this action on April 6, 2004 against Memorial Health Care System, Scott D. Hodges, D.O., Chattanooga Orthopedic Group, P.C., and a multitude of other defendants, and alleged that Dr. Hamm was admitted to Memorial Hospital on June 26, 2000 under the direction of defendant Hodges, who performed a surgical procedure called Laminectomies of L4 and L5 and Posterior Spinal Fusion L4-S1. Plaintiffs alleged that orthopedic devices manufactured by DePuy Acromed, were placed in and around Dr. Hamm's spinal column, and Dr. Hamm was later diagnosed with osteomyelitis, and the pathogen was identified as enterococcus fecalis. Dr. Hamm averred that he was referred to defendants Anesthesiology Consultants Exchange, P.C., d/b/a Pain Management Consultants, Dr. Gregory Ball, the Chattanooga Center for Pain Medicine, P.C., Dr. Roger Catlin, Dr. Gregory White, Dr. Susanne Benson, Chattanooga Neurology Associates, PLLC, and Dr. Bruce Kaplan, for treatment of Dr. Hamm's continuing pain.

Plaintiffs alleged that Dr. Hamm had to undergo extensive surgery to remove the hardware around his spinal column, and had to be treated for the osteomyelitis. They alleged that Memorial, Dr. Hodges, Chattanooga Orthopedic Group, and DePuy were negligent because a defective and unsterile medical device was implanted, and introduced a pathogen into Dr. Hamm's system. Plaintiffs alleged that enterococcus fecalis germ comes from the large intestine and should never be found in the spinal column area absent inappropriate treatment, and thus alleged *res ipsa loquitor*. They also alleged breach of warranties regarding the medical devices, and concluded that the other defendants breached the standard of care by improperly treating Dr. Hamm.

Defendants filed Answers denying plaintiffs' charges, and Dr. Hodges filed a Counterclaim, asserting that plaintiffs had already instituted a lawsuit against him in 2001 that was baseless, and ended in voluntary nonsuit. He sought damages for malicious prosecution.

Chattanooga Neurology Associates, PLLC, filed a Motion for Summary Judgment, and attached an Affidavit of Hytham Kadrie, M.D., who stated that he was Chief Manager for CNA, and that Dr. Bruce Kaplan had never been an employee or agent of CNA, but rather was an independent contractor physician. Further, that no one else associated with CNA had ever seen or treated Dr. Hamm. Plaintiffs did not respond to this motion, and the motion was granted.

Dr. Scott Hodges, Chattanooga Orthopaedic Group, P.C., Dr. Roger Catlin, Dr. Suzanne Benson, Dr. Gregory White, and the Chattanooga Center for Pain Management, filed a Motion to Dismiss, for plaintiffs' failure to respond to discovery. Dr. Bruce Kaplan filed a Motion for Summary Judgment, attaching his Affidavit, wherein he stated that he was practicing as an independent contractor, and was not an employee, agent or servant of CNA. He also stated that he began treating Dr. Hamm on July 31, 2000 until January 2001, but he did not treat Dr. Hamm after January 15, 2001.

Anesthesiology Consultants Exchange, P.C., and Dr. Gregory Ball filed a Motion for Summary Judgment, asserting that any claims against them were barred by the statute of limitations. In Dr. Ball's affidavit which was attached, he stated that Dr. Hamm was not seen by himself or anyone associated with Pain Management Consultants after October 2, 2000.

An Order of Voluntary Dismissal was entered with regard to defendant Depuy Acromed, Inc. The Court then granted summary judgment to defendants Ball, Anesthesiology Consultants Exchange, P.C., and Dr. Bruce Kaplan. The Court found that plaintiffs had not opposed these motions for summary judgment, and the case was dismissed pursuant to L.R.C.P. 8.05. Plaintiffs then filed a Motion to Reinstate, and the case was restored to the trial docket. Defendant Dr. Suzanne Benson filed a Motion for Summary Judgment, and attached her own Affidavit, stating, that she had treated Dr. Hamm on February 28, 2001 at the Chattanooga Center for Pain Management, P.C., and provided him with a diagnosis and care plan. She stated that at all times they met the recognized standard of care.

Dr. Catlin filed a Motion for Summary Judgment, and attached his own Affidavit, stating that he treated Dr. Hamm from October 2000 to February 16, 2001, and he met the applicable standard of care at all times. Dr. White also filed a Motion for Summary Judgment and attached his own Affidavit, wherein he stated that he last treated Dr. Hamm on March 30, 2001, and had always met the recognized standard of care.

Dr. Scott Hodges and Chattanooga Orthopaedic Group, filed a Motion for Summary Judgment, and attached an Affidavit of Dr. Hodges, who stated he admitted Dr. Hamm to Memorial Hospital on June 26, 2000, where he performed a fusion of Dr. Hamm's spine with sterile conditions. He stated that he was familiar with the applicable standard of care, and that he had met the same, and that his care did not cause injury to Dr. Hamm.

In response, Dr. Hamm filed his own Affidavit, and stated that he was licensed as a medical doctor in Tennessee, and his specialty was internal medicine. He stated that he went to see Hodges in 2000 about back pain, and that Hodges recommended a fusion of his lower back, which was performed. He stated that his pain gradually got worse, and he saw a number of doctors as a result. He stated that he eventually went to Vanderbilt, and they told him that the cause of his back problems was the failure to properly diagnose and treat the same. Dr. Hamm stated that he had to undergo extensive treatment, including two more surgeries.

He further stated that "the problem with my back arises out of the fact that the operating site upon which Dr. Hodges worked became infected. The infection comes from E. coli. An E. coli infection is a total rarity with respect to back problems." He stated that if Hodges and the other physicians who treated him had paid attention to his x-rays and other diagnostic studies, they would have discovered the source of his problems long ago and could have adequately corrected the same. He stated that he was familiar with the applicable standard of care, and that Dr. Hodges, Dr. Catlin, Dr. Benson, and Dr. White had violated that standard.

Defendants replied, stating that Dr. Hamm was not competent to render a medical opinion regarding a spine surgeon and pain management specialists, and argued that Dr. Hamm did not practice “in a specialty which would make his expert testimony relevant to the issues in the case”, citing Tenn. Code Ann. §29-26-115(b). Further, that Dr. Hamm had not established that he was familiar with the standard of care applicable to the specialty areas in which they practiced.

The Trial Court entered an Order on June 25, 2007, and said that Tenn. Code Ann. §29-26-113 required malpractice actions to be filed within one year of discovery, and stated that a plaintiff was deemed to have discovered his injuries when he was aware of facts sufficient to put a reasonable person on notice that an injury has been suffered as a result of wrongful conduct, citing *Roe v. Jasperson*, 875 S.W.2d 653 (Tenn. 1994). (R. 196.) The Court said that Dr. Hamm was a medical doctor who was last treated by Dr. Benson on February 28, 2001, and that the surgery took place on June 26, 2000. Further, that the only affidavit filed by plaintiffs was that of Dr. Hamm, which established that he was an internal medicine specialist, and did not specialize in either orthopedics or pain management. The Court held that Tenn. Code Ann. §29-26-115 required the expert be qualified to testify as to the standard of care in the community in which the defendants practiced, and also required the expert to be familiar with the standard of care for the defendants’ specialties. The Court found Dr. Hamm’s affidavit was insufficient as to those points, and there was no evidence to establish Dr. Hamm was not on notice of his claims against defendants. The Court granted summary judgment based on the lack of expert proof and the statute of limitations.

Dr. Hodges non-suited his counterclaim, and plaintiffs filed a Notice of Appeal.

The issue raised on appeal, as quoted from the plaintiffs’ brief is “whether the Trial Court erred in granting summary judgment to the defendants, Scott D. Hodges, D.O., Chattanooga Orthopaedic Group, P.C., and Gregory White, M.D?”.

Plaintiffs argue that the Trial Court erred in granting summary judgment because the affidavits filed by Drs. Hodges, White, and the Chattanooga Orthopaedic Group, do not address whether Drs. Hodges and White had any special training in reviewing x-rays and diagnostic studies for the presence of infections, and thus do not address plaintiffs’ claims that these defendants were negligent in failing to recognize the presence of an infection via such x-rays and diagnostic studies.

The Trial Court found that the affidavit filed by Dr. Hamm established that he was an internal medicine specialist, and did not specialize in either orthopedics or pain management, and that Tenn. Code Ann. §29-26-115 required the expert be qualified to testify as to the standard of care in the community in which the defendants practiced, and also required the expert to be familiar with the standard of care for the defendants’ specialties. The Court held that Dr. Hamm’s affidavit was insufficient as to both points.

Tenn. Code Ann. §29-26-115 states:

(a) In a malpractice action, the claimant shall have the burden of proving by evidence

as provided by subsection (b):

(1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred;

(2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and

(3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.

(b) No person in a health care profession requiring licensure under the laws of this state shall be competent to testify in any court of law to establish the facts required to be established by subsection (a), unless the person was licensed to practice in the state or a contiguous bordering state a profession or specialty which would make the person's expert testimony relevant to the issues in the case and had practiced this profession or specialty in one (1) of these states during the year preceding the date that the alleged injury or wrongful act occurred. This rule shall apply to expert witnesses testifying for the defendant as rebuttal witnesses. The court may waive this subsection (b) when it determines that the appropriate witnesses otherwise would not be available.

Plaintiffs counter that this Court has previously recognized that the above statute does not require that the witness practice in the same specialty as the defendants, but does require that the witness must be sufficiently familiar with the standard of care of the specialist and be able to give relevant testimony on that subject. *Goodman v. Phythyon*, 803 S.W.2d 697 (Tenn. Ct. App. 1990).

While the Trial Court found that Dr. Hamm was not knowledgeable of the specialty practiced by the defendants, which arguably would not impact on his ability to testify regarding x-rays and diagnostic tests, the Court also found that Dr. Hamm had not satisfied the "locality rule" contained within the statute, as he had not shown that he was familiar with the standard of care "in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred".

As we have previously stated:

A medical malpractice claim may not survive a summary judgment motion even when the patient files an opposing affidavit. It is now commonplace for medical practitioners to challenge the qualifications of the patient's expert. These challenges most frequently focus on the ability of the patient's medical expert to satisfy the mandatory qualifications in Tenn. Code Ann. § 29-25-115. Decisions regarding the

qualifications or competency of an expert are entrusted to the trial court's discretion. Accordingly, appellate courts reviewing a trial court's decision regarding the qualifications or competency of a patient's medical expert employ the "abuse of discretion" standard.

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For the purpose of Tenn. Code Ann. § 29-26-115(a), the only relevant "community" is the community in which the defendant physician actually practices or in a similar community. Accordingly, the courts have held that medical experts testifying for a patient in a medical malpractice case may not base their testimony solely on their familiarity with a national standard of professional practice. We have likewise rejected expert testimony based on a state-wide standard of professional practice, as well as testimony premised on a regional standard of professional practice.

*Kenyon v. Handal*, 122 S.W.3d 743, 759-762 (Tenn. Ct. App. 2003)(citations omitted).

Based upon the foregoing, we find the Trial Court did not abuse its discretion in holding Dr. Hamm's affidavit did not satisfy the requirements of the statute because, regardless of his specialty or his experience in reviewing x-rays and diagnostic tests, he did not state that he was familiar with the standard of care in the Chattanooga community. As such, Dr. Hamm's affidavit failed to satisfy the locality rule, and summary judgment was appropriate because plaintiffs were unable to establish a disputed issue of material fact. *See Kenyon*, also see *Robinson v. LeCorps*, 83 S.W.3d 718 (Tenn. 2002); *Allen v. Methodist Healthcare Memphis Hospitals*, 237 S.W.3d 293 (Tenn. Ct. App. 2007).

We pretermitted the issue of the statute of limitations and affirm the Judgment of the Trial Court and remand, with the cost of the appeal assessed to Emile Hamm and Angela Hamm.

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HERSCHEL PICKENS FRANKS, P.J.